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Draft Final Institutional Control Implementation and Assurance Plan Operable Unit 6 Libby Asbestos Superfund Site Libby, Montana

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Prepared for

#### BNSF Railway Company 800 North Last Chance Gulch

Helena, Montana 59601

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# **Title and Approval Sheet**

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# **Acronyms and Abbreviations**

ACM	asbestos-containing material
AOC	Administrative Order of Consent
AR	administrative record
ARP	Lincoln County Asbestos Resource Program
BMP	best management practice
BNSF	BNSF Railway Company
BOH	Lincoln County Board of Health
CBM	contaminated building material
CD	Consent Decree
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act
COC	contaminant of concern
CSS	contaminated screening study
DEQ	Montana Department of Environmental Quality
EPA	United States Environmental Protection Agency
ESD	explanation of significant differences
IC	institutional control
ICIAP	institutional control implementation and assurance plan
IH	industrial hygiene (BNSF department)
IUR	inhalation use risk
Kennedy Jenks	Kennedy/Jenks Consultants, Inc.
LA	Libby amphibole asbestos
MCA	Montana Code Annotated
MP	milepost
O&M	operations and maintenance
OSHA	Occupational Safety and Health Administration
OU	operable unit
PC	Project Coordinator
PLM	polarized light microscopy
PRP	potentially responsible party
RA	remedial action
RAL	remedial action level
Rfc	reference concentration
RI	remedial investigation
ROD	record of decision
ROW	right-of-way
SOW	statement of work
TAPE	Troy asbestos property evaluation
UU	Unlimited Use

UE	Unrestricted Exposure
VE	visual estimation
VV	visual vermiculite
W.R. Grace	W.R. Grace & Company

# Section 1: Introduction

This Institutional Control Implementation and Assurance Plan (ICIAP) has been prepared by Kennedy/Jenks Consultants, Inc. (Kennedy Jenks) on behalf of the BNSF Railway Company (BNSF) for the United States Environmental Protection Agency (EPA) for the EPA Region 8 Libby Asbestos Superfund Site. The Libby Asbestos Superfund Site (Libby Asbestos Site) has been divided into eight separate operable units (OUs) (Table 1-1). This plan describes institutional controls (ICs) currently in place or being developed for implementation within OU6, the BNSF railway corridor. Investigation and response actions in OU6 were completed by BNSF pursuant to an Administrative Order of Consent (AOC) [Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 08-2003-2004]. Site activities were completed in consultation with the EPA and Montana Department of Environmental Quality (DEQ), where applicable, under CERCLA.

This ICIAP covers OU6 and includes areas impacted and potentially impacted by contamination from activities associated with mining, processing, and shipping of vermiculite by the W.R. Grace & Company (W.R. Grace). Exposure to Libby amphibole asbestos (LA) was largely mitigated in OU6 by response actions including the removal and disposal of soil containing LA and placement of clean backfill in the BNSF Libby Railyard and former W.R. Grace loadout (completed by the EPA), removal of vermiculite from BNSF-owned buildings, and soil containing LA and concrete structure securement in the BNSF Troy Railyard.

This ICIAP identifies and documents activities that are designed to implement, maintain, and enforce ICs in place within OU6, and the organizations responsible for conducting these activities. This ICIAP will help ensure that ICs are properly implemented to protect the remedies in place and continue to operate as intended.

ICs will be included in the operations and maintenance (O&M) phases of the OU6 site and are included in the OU6-specific O&M plan and discussed in Section 5.1 of this plan. Implementation of ICs is the responsibility of BNSF, EPA and the DEQ, while the DEQ will be the primary agency responsible for IC oversight.

#### Table 1-1: Libby Asbestos Site OUs

OU #	Name
1	Former Export Plant
2	Former Screening Plant and nearby areas
3	Former Vermiculite Mine
4	Libby, Montana (residential, commercial, and public properties)
5	Former Stimson Lumber Mill
6	BNSF Railway
7	Troy, Montana (residential, commercial, and public properties)
8	U.S. and Montana State Highways



# Section 2: Site Details

# 2.1 Site Description

The Libby Asbestos Superfund Site (Superfund Enterprise Management System #MT0009083840) (Libby Asbestos Site) is located within and around the City of Libby and Town of Troy, Montana. Libby is the county seat of Lincoln County and lies in the northwestern corner of Montana, approximately 35 miles east of Idaho and 65 miles south of Canada. Libby and Troy lie in a valley carved by the Kootenai River and framed by the Cabinet Mountains to the south. The site location is shown on Figure 1.

Human health and the environment have been impacted by mining and processing of vermiculite in the Libby area. The vermiculite mine began limited operations in the 1920s and was operated on a larger scale by W.R. Grace from approximately 1963 to 1990. Studies revealed the vermiculite from the mine contains amphibole-type asbestos, referred to as LA.

The EPA initiated an emergency response action in November 1999 to address questions and concerns raised by citizens of the City of Libby regarding possible exposures to asbestos fibers as a result of historical mining, processing, and exportation of asbestos-containing vermiculite. To facilitate a multi-phase approach to remediation of the Libby Asbestos Site, eight separate OUs were established. These OUs are shown on Figure 2 and are described by the EPA as follows (EPA 2016a):

- **OU1 Former Export Plant.** The geographic definition of OU1 is the parcel of land that included the former Export Plant and the Highway 37 embankments, situated on the southern side of the Kootenai River, just north of the downtown area of the City of Libby. Land encompassed by OU1 is owned by the City of Libby and the Montana Department of Transportation. OU1 covers approximately 17 acres. The Kootenai River to the north, the BNSF right-of-way (ROW) to the south, and residential properties to the east and west define the boundaries of OU1.
- **OU2 Former Screening Plant.** OU2 includes areas impacted by contamination released from the former Screening Plant. These areas include the former Screening Plant, the Flyway property, the Highway 37 ROW adjacent to the former Screening Plant and/or Rainy Creek Road, and privately-owned properties. OU2 covers approximately 41 acres. The Kootenai Bluff Subdivision area, which included the former W.R. Grace railroad loading area, located directly across the Kootenai River from the former Screening plant, was removed from OU2 and is now part of OU4 (described below).
- **OU3 Former Libby Vermiculite Mine (Mine).** The mine OU includes the former vermiculite mine and the geographic area (including ponds) surrounding the former vermiculite mine that has been impacted by releases from the mine, including Rainy Creek and the Kootenai River.
- **OU4 Libby Residential/Commercial Area.** OU4 includes the residential, commercial, industrial (not associated with W.R. Grace mining operations), and public properties (including schools and parks) in and around the City of Libby.



- **OU5 Former Stimson Lumber Mill.** The original geographic definition of OU5 was the parcel of land that included the former Stimson Lumber Mill. OU5 covers approximately 400 acres. The high bank of Libby Creek to the east, the BNSF ROW to the north, and properties within OU4 to the south and west define the boundaries of OU5. Various vacant structures or buildings as well as multiple operating businesses currently occupy OU5.
- **OU6 BNSF Railroad.** OU6 consists of the railroad ROW from the eastern boundary of OU4 to the western boundary of OU7. OU6 is approximately 41 miles long (roughly from east to west) and varies in width from less than 100 feet to more than 300 feet and encompasses the railyards in Libby and Troy.
- **OU7 Town of Troy.** OU7 is defined as the residential, commercial, and public properties in and around the Town of Troy, Montana, located 20 miles west of downtown Libby.
- **OU8 Highways.** OU8 consists of the Montana State Highway 37, US Highway 2, and county roads (Kootenai River Road, County Highway 482, and Highway 567) and ROWs within the boundaries of and between OU4 and OU7.



# Section 3: Operable Unit 6 – BNSF Railroad

# 3.1 OU6 Characteristics and History

As discussed in Section 2.1, OU6 extends from the limits of OU4 on the east to the limits of OU7 on the west. In railroad terms, OU6 extends from BNSF milepost (MP) 1301 (east) to MP 1342 (west) of BNSF's Kootenai River Subdivision. The extent of OU6, and its relationship to other OUs, are shown on Figure 2.

BNSF operates a railroad that transports agricultural products, raw materials, and manufactured goods from around the United States and the world. BNSF's operations are integral to interstate commerce and international trade. OU6 includes approximately 41 miles of active rail ROW that is a key part of BNSF's interstate infrastructure. Approximately 80 million gross tons of freight (and approximately 650 passenger trains) traveled through this area annually.

BNSF owns or has an ownership interest in the property encompassed by OU6 and the land use is expected to remain as a "transportation corridor" for the foreseeable future.

For the purpose of this report, OU6 is subdivided into three areas, each of which has a distinct railroad purpose, investigation, and response action history. Each area is described below.

### 3.1.1 Right-of-Way

The BNSF ROW refers to the railroad ROW outside of the Libby and Troy Railyards. The ROW varies in width but is generally 100 feet to either side of the track centerline. The ROW hosts a single track mainline with six passing sidings consisting of:

Siding Name	Eastern MP	Station Sign MP	Western MP	
Riverview	1305.8	1306.9	1307.4	
Ripley	1311.2	1312.2	1313.2	
Libby	1319.9	1319.6	1322	
Kootenai Falls	1330.4	1331.3	1332.2	
Troy	1337.2	1337.9	1339.4	
Yakt	1341.9	1343.3	1343.9	

#### Table 3-1: BNSF Siding Locations

The former W.R. Grace loadout is located along the BNSF ROW, approximately 4 miles east of Libby. The mainline generally follows the original route, constructed by the Great Northern Railway in the late 1800s, except for the extreme eastern end of OU6 (MP 1307.4 to MP 1301) that parallels the Fisher River. This section was laid in the early 1970s in preparation for the



construction of the Libby dam, which was dedicated in 1975. An overview of the OU6 ROW is shown on Figure 2.

Several BNSF- and lessee-owned buildings were formerly and are currently located in Libby and Troy. BNSF removed vermiculite insulation from BNSF-owned buildings in 2001 and those buildings were demolished in 2014. The former and current locations of BNSF and lessee-owned buildings in Libby and Troy are shown on Figures 3 and 4, respectively.

The only remaining BNSF-owned building in OU6 is the Libby Amtrak Depot, which is located south of the mainline and east of the Highway 37 overpass. The Libby Amtrak Depot serves as a ticket sale and passenger waiting area for the two daily Amtrak passenger trains serving Libby. In 2016, Amtrak completed significant renovations to the Depot, which included the removal of contaminated building materials (CBMs). CBMs are defined in the *Record of Decision for Libby Asbestos Superfund Site, Libby and Troy Residential and Commercial Properties, Parks and Schools, Transportation Corridors, Industrial Park. Operable Units 4-8 (ROD) as vermiculite or other manufactured building materials (e.g., insultation, log chinking, chimney mortar, plaster, cinder blocks, pipe insulation) that, when disturbed, would cause LA exposures that would result in unacceptable human health risks (EPA 2016a). Details of the Amtrak renovations of the Libby Depot are provided in Appendix A of the <i>OU6 Remedial Action Report (OU6 RA Report)* (Kennedy Jenks 2021).

Lessee-owned buildings are present along the OU6 ROW in Libby and Troy, as shown on Figures 3 and 4, respectively. The EPA completed contaminant screening studies (CSSs) at several lessee-owned commercial buildings in Libby in 2002. CBMs, soil containing LA or LA source materials were not identified during the CSSs. The buildings were originally assigned to OU4 but were reassigned to OU6 in 2014 (CDM Smith 2014). A Quonset hut, located at 220 East 1<sup>st</sup> Street in Libby (Libby Quonset hut) could not be accessed during the 2002 CSSs, but was inspected by a BNSF contractor in 2020 and CBMs, soil containing LA or LA source materials were observed. The DEQ completed a Troy asbestos property evaluation (TAPE) at one lessee-owned commercial building in Troy in 2009 where CBMs were not identified. Two soil samples were collected from the basement level of the building during the TAPE and results did not indicate the presence of LA.

Based on available information, CBMs are not present in OU6. Therefore, structures in OU6 do not exceed the CBMs remedial action limits (RALs), which consist of the following:

• Presence of accessible LA-containing vermiculite insulation in any quantity in living spaces, non-living space, and/or secondary structures

or

- Presence of accessible friable and/or deteriorated building materials containing greater than or equal to 0.25 percent LA by PLM-PC400 (e.g., chinking, plaster, mortar, and other materials on boilers, pipes, or other appurtenances).
- Note: PLM-PC400 refers to a specific approach previously used at the Libby Asbestos Site to perform point counting using polarized light microscopy (PLM) (i.e., examining 400 points) and is not an EPA-standard method.



Although OU6 buildings currently meet CBM RALs, renovations or alterations of buildings could result in the discovery of previously unknown CBMs. Because of this potential, best management practices (BMPs) will be developed for building renovation and demolition and included in the OU6-specific O&M plan.

# 3.1.2 Libby Railyard

The Libby Railyard is located on the northern side of Libby, Montana, between downtown and the Kootenai River. The Libby Railyard lies between approximately MP 1319.3 and MP 1320.1, covering approximately 6 acres. The Libby Railyard is bounded to the south by the BNSF mainline and to the north by a City of Libby park, and residential and commercial properties, as well as the Kootenai River. Prior to 2004, the Libby Railyard consisted of several yard tracks that were used to store railroad cars destined for local industries, and a scale house used to weigh railcars. As part of the 2004 response actions, the yard tracks and scale house were removed from the Libby Railyard. Since 2004, BNSF has reinstalled one yard track.

Response actions completed in the Libby Railyard were described in the *Final Remedial Investigation Report for Operable Unit 6 at the Libby Asbestos Site – Libby, Montana* (RI Report) (Kennedy Jenks 2014) and consisted of source material removal and the installation of a protective soil cap. This response action area will require O&M to monitor IC integrity and the protectiveness of backfilled areas and covers.

An overview of the Libby Railyard and associated current and former features are shown on Figure 3.

### 3.1.3 Troy Railyard

The Troy Railyard is located on the eastern side of downtown Troy, Montana, between downtown and the Kootenai River. The Troy Railyard lies between approximately MP 1337.4 and 1338.3, covering approximately 20 acres. The Troy Railyard is bounded to the west by BNSF mainline, while residential properties are present to the east. The Troy Railyard consists of five tracks used for temporary railcar storage. An abandoned concrete structure was present on the southeastern side of the Troy Railyard (Troy concrete structure). The purpose of the Troy concrete structure was unknown, but openings in the structure were covered with steel plates to prevent access.

During the Site Walkthrough/Final Inspection with DEQ and EPA in May 2018, a new opening was observed beneath the steel plates previously installed on the Troy concrete structure. In September 2018, BNSF personnel took additional measures to secure new opening in the Troy concrete structure. In 2020, BNSF demolished the Troy concrete structure. Additional details are provided in the *OU6 RA Report* (Kennedy Jenks 2021).

The locations of current and former features in the Troy Railyard are shown on Figure 4.

# 3.2 Investigation and Response Action Summary

Multiple investigations and response actions occurred in OU6 between 1994 and the signing of the Record of Decision for Libby Asbestos Superfund Site, Libby and Troy Residential and



*Commercial Properties, Parks and Schools, Transportation Corridors, Industrial Park. Operable Units 4-8* (ROD) in February 2016 (EPA 2016a). These pre-ROD activities were completed by BNSF, except for EPA-led investigations and response actions completed at the W.R. Grace loadout between 1999 and 2001. Detailed descriptions of BNSF-led, pre-ROD activities were provided in the *Final Remedial Investigation Report for Operable Unit 6 at the Libby Asbestos Site – Libby, Montana* (Kennedy Jenks 2014).

Post-ROD sampling or monitoring events were completed in September 2016, April 2017, August through November 2018, and April 2020 and consisted of confirmation surface soil sampling, test pit soil sampling, Occupational Safety and Health Administration (OSHA) air monitoring, and building inspections, respectively. Details of the post-ROD confirmation surface sampling event can be found in the 2016 Confirmation Surface Soil Sampling Data Summary Report – Revision 2 (Kennedy Jenks 2017a). Details of the April 2017 test pit soil sampling can be found in *Final Test Pit Soil Sampling Summary Report* (Kennedy Jenks 2017b). The BNSF industrial hygiene (IH) department conducted personal and stationary air sampling in August 2018, to evaluate air quality during railroad signal upgrades, which included soil disturbing activities. BNSF contractors completed a CBM inspection at the Libby Quonset hut in April 2020. The reports summarizing 2018 IH sampling activities and 2020 CBM inspection are included in Appendix A the OU6 RA Report (Kennedy Jenks 2021).

Post-ROD response actions were completed in July 2016, September 2018, and September 2020 and consisted of asbestos-containing material (ACM) abatement at the BNSF Libby Depot, securement measures and demolition undertaken at the Troy concrete structure, respectively. Post-ROD response actions are described in Appendix A of the *OU6 RA Report*.

Pre- and post-ROD investigation and response action activities are summarized in Tables 3-2 and 3-3, respectively.



Date	Pre-ROD Investigation Activity			
December 1999	EPA-led Emergency Response Action Soil Sampling			
March 2001	Vermiculite Building Inspection			
April 2001	Soil/Undercutter Spoils Sampling			
November 2001	Railyard Soil Sampling			
June 2002	EPA-led Contaminant Screening Study of OU6 Buildings			
October 2002	Railyard Soil Characterization Sampling			
November 2002	Railyard Soil Sampling			
July 2004	Railyard Soil Sampling			
September 2004	Railyard Soil Sampling			
July 2008	OSHA Air Sampling - Rail Crossing Replacement			
September 2008	OSHA Air Sampling - Steel Gang			
September 2008	Activity Based Sampling - Public Receptors			
September 2008	Activity Based Sampling - Worker Receptors			
May 2009	OSHA Air Sampling - Supersurfacing Gang			
August 2009	DEQ-led Troy Asbestos Property Evaluation of OU6 Building			
August 2009	Undercutter Spoils Sampling			
March 2010	OSHA Air Sampling - Steel Gang			
May 2010	OSHA Air Sampling - Stimson Wye Removal			
September 2011	OSHA Air Sampling - Ballast Cleaning/Surfacing			
July 2013	Air Sample Reanalysis			
April 2014	Remedial Investigation Report			
February 2016	ROD for OUs 4 Through 8 Signed			
Date	Post-ROD Investigation Activity			
Aug-Sept 2016	Confirmation Surface Soil Sampling			
April 2017	Stimson Spur Test Pit Investigation			
Aug-Nov 2018	Asbestos Exposure Monitoring			
April 2020	220 East 1st Street Building Inspection			

#### Table 3-2: Summary of Investigation Activities in OU6

Date	Pre-ROD Response Action Activity
April 2001	Vermiculite Removal Action
September 2001	EPA-led Soil Response Action - W.R. Grace Loadout
August 2003	Libby Railyard Response Action Pilot Test
September 2004	Libby Railyard Response Action
November 2005	Libby Railyard Response Action
October 2010	Troy Solid Waste with Vermiculite Removal
June 2011	Troy Concrete Structure Securement
Date	Post-ROD Response Action Activity
September 2016	Amtrak Depot Renovations
September 2018	Troy Concrete Structure Securement
September 2020	Troy Concrete Structure Demolition

#### Table 3-3: Summary of Response Action Activities in OU6

## 3.2.1 Summary of Institutional Control Elements

The following is a summary of response action IC elements that will be implemented to satisfy the remedial alternatives discussed in the ROD.

ICs will be used to ensure that future encounters, if any, with residual LA-impacted materials in OU6 are managed appropriately. Currently, ICs for OU6 include proprietary controls, governmental controls, enforcement tools, and informational devices. To the extent additional ICs are established for OU6, this document will be updated as needed.

Listed below are the ICs for OU6; status of each IC instrument is discussed in Table 4-1 and each IC is described in Section 5.

- Proprietary Controls
  - Restrictive Covenant (portions of Libby Railyard) (Recorded 12/19/2017 at Book 370, Page 508, Lincoln County)
- Enforcement Tools
  - Consent decree (CD)
- Informational Devices
  - Lincoln County Asbestos Resource Program (ARP)
  - Montana utility locate service (Montana811)
  - o BNSF Access and Permitting Application Process
  - o Administrative Records
  - O&M Plan including BMP Manual.



# 3.3 Contaminant of Concern

The contaminant of concern (COC) creating the potential exposure to the public, tenants, or owners at OU6 have been used interchangeably by the EPA as Libby amphibole asbestos or LA. The EPA has established an inhalation use risk (IUR) value and reference concentration (Rfc) value for exposure to LA at the Libby Asbestos Site. Information of the IUR value and Rfc value for exposure to LA is detailed in the *Final Site-Wide Human Health Risk Assessment, Libby Asbestos Superfund Site, Libby, Montana* (CDM Smith 2015).

The vermiculite deposit that was mined by W.R. Grace contains a distinct form or naturallyoccurring amphibole asbestos that is comprised of a range of mineral types and morphologies. The term LA is used in this document to identify the mixture of amphibole mineral fibers of varying elemental composition (e.g., winchite, richterite, tremolite, etc.) that have been identified in the Rainy Creek complex near Libby, Montana (Meeker et al. 2003). LA is a hazardous substance under CERCLA. LA can form durable, long, and thin structures that are generally respirable, can reasonably be expected to cause disease, and hence, is considered the COC at the Libby Asbestos Site.

Because vermiculite mined from Libby has been found to be contaminated with LA, which is known to cause human health effects, the EPA initiated an emergency response action in November 1999 to address questions and concerns raised by citizens of Libby regarding possible ongoing exposures to asbestos fibers as a result of historical mining, processing, and exportation of vermiculite.

### 3.3.1 Boundaries of Impacted Resources

Several investigations and response actions have been previously conducted within OU6 and are summarized in Section 3.2. Based on those investigations, soil containing LA and LA source materials have been remediated from, or are known to be present in, buildings, and surface and subsurface soil within OU6. For the purpose of this document, LA-source materials include vermiculite insulation, processed vermiculite ore, and mine wastes. The location of response action areas in OU6 are shown on Figures 3, 4, and 5.

#### 3.3.1.1 Soil Areas Mitigated by Response Actions

Known locations of soil containing LA have been described in the RI Report and *Final Operable Unit 6 2016 Confirmation Surface Soil Sampling Data Summary Report Revision 2* (Kennedy Jenks 2017a). These locations include:

- Soils within the Zone 4/7 of the Libby Railyard are known to contain tremolite/actinolite at concentrations less than 1.0 percent as determined by EPA method PLM-9002. The locations of soil known to contain tremolite/actinolite in Zone 4/7 are shown on Figure 7. This area is capped with a minimum of 12 inches of clean fill and is identified in a Restrictive Covenant for Real Property (Restrictive Covenant) which has been recorded with the Lincoln County Clerk and Recorder's office (Appendix A).
- One location within Zone 1/2/3 of the Libby Railyard had subsurface soil (greater than 6 feet below ground surface) with tremolite/actinolite concentrations less than



1.0 percent as determined by EPA method PLM-9002. The locations of soil known to contain tremolite/actinolite in Zone 1/2/3 are shown on Figure 7. This area is covered by several feet of clean fill and is identified in a Restrictive Covenant which has been recorded with the Lincoln County Clerk and Recorder's office (Appendix A).

- Soil containing visible vermiculite (VV) was reported to be present in the Troy concrete structure located on the southeastern side of the Troy Railyard. Due to limited access in the Troy concrete structure, soil with VV was removed with hand tools and properly disposed in 2010. Soil portions of the floor of the abandoned structure were sealed with concrete and the exterior openings were covered with steel plates in 2011. Additional measures, consisting of placement of concrete ties and ballast, were completed in 2018 to further secure the Troy concrete structure. BNSF demolished the Troy concrete structure is shown on Figure 4.
- Surface soil samples collected during a 1999 EPA-led sampling event on BNSF property near the former W.R. Grace loadout are known to contain tremolite/actinolite at concentrations less than 1.0 percent as determined by EPA method PLM-9002 (CDM Smith 2017). An EPA-led soil removal was conducted in 2001. General excavation grid information provided by the EPA suggests soil containing detectable asbestos and VV was removed from BNSF-owned property (CDM Smith 2017). Confirmation samples were analyzed and were reported with concentrations less than 1.0 percent. The approximate locations of the soil removal areas are shown on Figure 5.

The distribution of soil samples and corresponding results are shown on Figure 6.

#### 3.3.1.2 Soil Areas Where Response Actions were not Required

The following conclusions have been developed based on information contained in the RI Report and the *Final Operable Unit 6 2016 Confirmation Surface Soil Sampling Data Summary Report Revision 2* (Kennedy Jenks 2017a):

- Currently, no known locations within OU6 have surface soil with LA concentrations greater than the transportation corridor RAL, which is defined in the ROD as an LA concentration of Bin C by PLM – visual estimation (VE) (i.e., LA is present at levels greater than or equal to 1 percent).
- Select surface soil sample locations along the ROW are known to contain LA up to trace concentrations [less than 0.2 percent (by mass)] as determined by PLM – VE. LA concentrations in surface soil sample locations along the OU6 ROW are shown on Figures 8 and 9.

The distribution of soil samples and corresponding results are shown on Figure 6.

#### 3.3.1.3 Buildings Mitigated by Response Actions

Known locations of LA source materials in OU6 buildings were described in the RI and the RA reports. The locations of buildings within OU6 are shown on Figures 3 and 4.



As described in Section 3.1.1, LA source materials have been removed from BNSF-owned buildings within OU6, consisting of the Section/Communications building and concrete structure in Troy and the Section house and Amtrak Depot in Libby. LA-source materials were removed from these buildings/structure and disposed, according to industry standard methods in place at the time. The Libby Section house and the Troy Section/Communication building were demolished in 2014 and the Troy concrete structure was demolished in 2020, leaving the Libby Amtrak Depot as the sole, remaining BNSF-owned building in OU6. Based on available information, LA source materials are not known to remain in BNSF-owned buildings within OU6, satisfying the CBM RALs. LA source material removal locations are shown on Figures 3 and 4.

#### 3.3.1.4 Buildings Where Response Actions were not Required

As described in Section 3.1.1, lessee-owned buildings are present in OU6. Based on CSS and TAPE records of lessee-owned buildings in Libby (CDM Smith 2002) and Troy (Tetra Tech 2009), respectively, LA-source materials are not present in lessee-owned buildings in OU6. Additionally, BNSF inspected the Libby Quonset hut in 2020 and LA-source materials were not identified (Arcadis 2020). The absence of known LA-source materials satisfies the CBM RALs in OU6. The locations of lessee-owned buildings are shown on Figures 3 and 4.

As described above, LA-source materials are not present in OU6 buildings. Therefore, CBMs are not included in annual O&M inspections.

# 3.4 Current OU6 Site Information

#### 3.4.1 Parcel Ownership/Occupancy Information

OU6 is defined as property BNSF owns and/or operates within the limits of the Libby Asbestos Superfund Site. BNSF's ownership interest varies throughout OU6.

Operator: BNSF Railway Company 2500 Lou Menk Drive Fort Worth, Texas 76131-2828

OU6 is currently classified, and is anticipated to remain, a transportation corridor.

BNSF has designated the Manager Environmental Remediation for Montana as the Project Coordinator (PC). Contact information for the BNSF PC is as follows:

BNSF Railway Company Manager Environmental Remediation 800 North Last Chance Gulch Helena, Montana 59601 406-256-4048



As required by the CD, BNSF has designated Kennedy Jenks as the Supervising Contractor. Contact information for the Supervising Contractor is as follows:

Kennedy/Jenks Consultants, Inc. 230 W. Superior Street, Suite 400 Duluth, Minnesota 55802 218-491-6517 Contact: Scott Carney

#### 3.4.2 Property Interest and Resource Ownership

Although ownership and maintenance responsibilities within OU6 are listed as that of BNSF, residential and commercial properties abutting the BNSF ROW and Libby and Troy Railyards have undergone investigation and response actions. Additionally, select buildings within OU6 are owned by lessees.

### 3.4.3 Current and Reasonably Anticipated Future OU6 Land Use

#### 3.4.3.1 Land Use

ICs have been developed based on current land use as a transportation corridor. It is reasonably anticipated that future land use will continue to be as a transportation corridor.

Based on communications with the EPA, the transportation corridor RAL will be applied to any area inside or characterized as OU6 unless land use within portions of OU6 change and more closely resemble another Superfund land use classification as described by the ROD (EPA 2016b).

#### 3.4.3.2 Groundwater Use

The EPA does not consider groundwater to be a viable pathway for LA exposure in OU6; therefore, groundwater is not included under this ICIAP.

#### 3.4.3.3 Surface Water Use

The EPA does not consider surface water to be a viable pathway for LA exposure in OU6; therefore, surface water is not included under this ICIAP.

### 3.4.4 Responsible Parties and Stakeholders

Currently, no additional responsible parties or stakeholders have been identified other than those identified in Section 3.4.1.

# 3.4.5 Local Government Information

Lincoln County has entered into a cooperative agreement with the DEQ, in which the ARP was developed. The ARP was developed to assist in educating the public and managing risks associated with asbestos exposure, including implementing initiatives to reduce the risk of asbestos exposure. The ARP works under the direction of the Lincoln County Commissioners.



# 3.5 Site Mapping

Maps showing LA concentrations in surface soil, outside of response action areas, are included as Figures 8 and 9.



# Section 4: Institutional Control Implementation

Table 4-1 provides brief summaries of the implementation of IC instruments in OU6 set forth by this ICIAP. Details regarding IC instruments are provided in Section 5.

Instrument Name	Restrictive Covenant (RC)	Consent Decree	Montana811	Asbestos Resource Program (ARP)	Administrative Record	O&M Plan/BMP Manual <sup>(a)</sup>	BNSF Internal Controls
Instrument Category	Proprietary Control	Enforcement Tools	Informational Device	Informational Device	Informational Device	Informational Device	Informational Devices
IC Objectives <sup>(b)</sup>	1, 2, 3	1	1, 2, 3	1, 2, 3	1, 2, 3	1, 2, 3	1, 2, 3
Use to Maintain Protectiveness of Remedy	P revent potential disturbance, transportation, and exposure to vermiculite- impacted soils	Prevent potential disturbance, transportation, and exposure to vermiculite- impacted soils	Not Applicable	Not Applicable	Not Applicable	Best Management Practices and Engineering Controls	Prevent potential disturbance, transportation, and exposure to vermiculite- impacted soils
Implementation Prerequisites	A lready in Place	A lready in place	A lready in place	A lready in place	A Iready in place	A lready in place	A Iready in place
Implementation Complete	A lready in Place	A lready in place	A lready in place	A lready in place	A Iready in place	A lready in place	A Iready in place
Person or Organization Responsible for Performing Implementation	BNSF/DEQ	BNSF/EPA/DEQ	EPA/ARP	EPA/ARP	EPA/DEQ	DEQ/BNSF	BNSF
Instrument Lifespan	As determined by the EPA and DEQ						
Conditions for Termination of IC	Complete removal of LA-impacted materials to achieve UU/UE						

#### Table 4-1: Status of IC Implementation

(a)  $\mathsf{BMP}$  -  $\mathsf{Best}\,\mathsf{M}\,\mathsf{anagement}\,\mathsf{Practices}\,\mathsf{manual}\,\mathsf{is}\,\mathsf{Appendix}\,\mathsf{C}\,\mathsf{of}\,\mathsf{the}\,\mathsf{O}\&\mathsf{M}\,\,\mathsf{P}\,\mathsf{lan}$ 

(b) IC Objectives (see Section 5.1)

1 Soil - Prevent LA fibers that may remain in soil within OU6 after meeting remedial criteria for the land use category from becoming a future source of unacceptable risk

2. Building Materials - Prevent LA fibers that remain in inaccessible building materials from becoming a future source of unacceptable exposure.

3. Land Use - Track changes in land use and develop a notification system to ensure that property owners, prospective property owners, and workers are aware of remaining or potential LA, which could become a future sources of unacceptable exposure and IC requirements.



# Section 5: Institutional Control Instruments

The following section outlines IC components and the four types of IC instruments (categories) in place at OU6: proprietary controls, governmental controls, enforcement tools, and informational devices.

# 5.1 Key Components

### 5.1.1 Institutional Controls Objectives

The three main objectives of the OU6 ICs, based on the ROD, are:

- 1) **Soil:** Prevent LA fibers that may remain in soil after meeting remedial criteria for transportation corridors from becoming a future source of unacceptable exposure.
- 2) **Building Materials**: Prevent LA fibers that remain in inaccessible building materials from becoming a future source of unacceptable exposure.
- 3) Land Use: Track changes in land use and develop a notification system to ensure that property owners, prospective property owners, users, and workers are aware of remaining or potential LA, which could become a future source of unacceptable exposure and IC requirements.

### 5.1.2 Current and Reasonably Anticipated Future Land Use

The ICs in place at OU6 are expected to allow for the current and reasonably anticipated future uses of transportation corridor activities. ICs are expected to address potential disturbance of the protective remedy through means such as an MCA Section 75-10-727 IC (Restrictive Covenant), Montana811, contacting the ARP, BNSF personnel briefings, and BNSF Access and Permitting application process, as applicable. If additional sitewide ICs are established, this ICIAP will be updated.

### 5.1.3 Instrument Duration

IC instruments applicable to OU6 are expected to be in-place as long as deemed necessary by the EPA and DEQ. The only condition for termination of other individual IC Instruments will be the complete removal and proper disposal of soil containing LA and LA source materials, allowing for unlimited use/unrestricted exposure (UU/UE).

# 5.2 Instrument Categories

ICs are typically divided into four distinct categories: proprietary controls, government controls, enforcement tools, and informational devices. The following sections identify the IC instruments that are applicable in OU6. Government controls are not included in this discussion since they will not be employed in OU6.



## 5.2.1 **Proprietary Controls**

Proprietary controls involve legal instruments placed in the chain of title for the site or property. For OU6, under MCA Section 75-10-727, a DEQ-approved Restrictive Covenant was prepared and recorded, restricting land use in portions of the Libby Railyard. This IC mitigates potential risk to public health by way of a Restrictive Covenant and notifies future landowners/users of previous response actions completed at the Libby Railyard and of known or potential locations of vermiculite-impacted soil within the boundary of the Restrictive Covenant. The Restrictive Covenant was recorded on 19 December 2017 with Lincoln County and is included as Appendix A.

#### 5.2.1.1 **Proprietary Controls Use Restrictions**

Use restrictions for this IC are identified in the Restrictive Covenant pursuant to MCA 75-10-727, which is included as Appendix A. Use restrictions included in the Restrictive Covenant consist of:

- Restriction on excavation within the property
- Protection of the integrity of the removal action
- Access, cooperation, and information.

#### 5.2.2 Enforcement Tools with Institutional Control Components

Enforcement tools such as permits and CDs are legal tools that limit certain site activities or require the performance of specific activities (e.g., to monitor and report on an IC's effectiveness) (EPA 2012).

The following enforcement tools are in place in OU6 (document dates in parenthesis):

• CD (filed 30 November 2020)

Of these documents, only the Restrictive Covenant includes land use restrictions. The CD and accompanying statement of work (SOW) requires the development of an RA Report, this document, and an O&M plan. The O&M plan specifies the completion of annual inspections and reports, which will be incorporated into the EPA's 5-year reviews.

### 5.2.3 Informational Devices

Informational devices at OU6 will include the ARP, Montana811, administrative record (AR), BNSF access permitting program, and OU6-specific O&M Plan (Kennedy Jenks 2021). Details for each Informational Device are discussed below.

The ARP is a program currently staffed in Lincoln County, Montana, and funded by the DEQ. The ARP was developed as an interim program to educate the public regarding the remaining risk of LA exposure; provide resources to manage the risks associated with LA exposure; and implement initiatives to reduce or prevent the risk of LA exposure. Assistance in managing soil containing LA or LA-source materials may include, but is not limited to, providing resource



materials, information, BMPs, training, and contractor referrals. Although OU6 is a potentially responsible party (PRP) -led effort, the ARP is available for any persons interested in resources available to minimize risks associated with LA are encouraged to contact the ARP at:

Lincoln County Asbestos Resource Program 513 California Avenue Libby, Montana 59923 406-291-5335 www.LCARP.org

When the Montana811 call center is notified of activities planned within the OU6 boundaries, the Montana811 call center will notify the ARP. If disturbance of soil containing LA is anticipated or required in OU6, the ARP will forward requests to the BNSF PC listed in Section 3.4.1. Advice on how to address the contamination, if disturbance is required, may be obtained from the BNSF PC.

All external individuals and organizations intending to perform work OU6 must apply for access through BNSF's access permitting program. Approved BNSF access permit applications will be returned to the permittee, with a copy of the BMP Manual, which will provide the permittee with precautions to guard against potential exposure to LA contamination and information to develop contingency plans in case vermiculite is encountered.

BNSF personnel planning and/or performing soil-disturbing activities within OU6 have access to BNSF internal informational devices including GIS mapping, informational briefings, and informational materials.

The BMP Manual will be developed as an appendix of the O&M Plan to outline BMPs when working with potentially impacted materials. The BMP Manual will provide guidance to assist in the prevention or reduction in the release of, and exposure to, LA. The BMP Manual also describes BNSF's internal policies and procedures that will be implemented to control access to BNSF property and training for personnel working within OU6.

The full administrative record is housed at the EPA Superfund Records Center in Denver, Colorado. Contact information is as follows:

EPA Superfund Records Center 1595 Wynkoop Street Denver, CO 80202-1129

To request copies of administrative record documents, call: (303) 312-7273 or (800) 227-8917 ext. 312-7273 (toll free Region 8 only).



Local information repositories include the Lincoln County Public Library branches in Libby and Troy. Contact information is as follows:

Lincoln County Public Library – Main Branch, Libby 220 W 6<sup>th</sup> Street Libby, Montana 59923 406-293-2778 Hours: Tuesday -1:00 p.m. to 6:00 p.m. Wednesday through Friday - 10:00 a.m. to 4:00 p.m. Saturday – 11:00 a.m. to 2:00 p.m.

Lincoln County Public Library – Troy Branch 3<sup>rd</sup> and Kalispell Troy, Montana 59935 406-295-4040 Hours: Tuesday -1:00 p.m. to 6:00 p.m. Wednesday through Friday - 10:00 a.m. to 4:00 p.m. Saturday – 11:00 a.m. to 2:00 p.m.

#### 5.2.3.1 Informational Devices Use Restrictions

No use restrictions are associated with these informational devices, except internal BNSF informational devices, which will only be accessible by or through authorized BNSF personnel.



# Section 6: Institutional Control Maintenance

IC maintenance consists of periodic monitoring and reporting to confirm that ICs are in place and providing protection as intended. Maintenance activities may include notifications to new lessees, and periodic review of the property and ICs. BNSF personnel will receive periodic briefings regarding the detection of soil containing LA, proper work practices, and BMPs to be used if soil containing LA is encountered.

In the event of a transfer of ownership of all or any part of OU6, it is the BNSF's responsibility to ensure that the new owner is informed of the ICs in place at the property. In the event of change in ownership, the new owner will be solely responsible to inform tenants of ICs in place at the property. In the case of a property sale, the intended use of the property may need to be evaluated by the DEQ to determine whether the existing ICs in place are sufficient to protect land users from exposure.

Currently, the DEQ and ARP communicate property information for locations with potential issues or response activities to the EPA through the Libby Instance of Response Manager. The Libby Instance of Response Manager is a database which contains addresses, property identifiers, geographical unit, contacts, access and property statuses, and other property-specific response information.

To facilitate monitoring of the ICs, roles and responsibilities, schedule, corrective actions, and reporting requirements will be performed in accordance with the OU6 O&M Plan and its associated appendices (Kennedy Jenks 2021).

Since OU6 is a PRP-led response, annual reports summarizing O&M activities, which includes verifying the integrity of ICs, will be prepared by BNSF personnel, and submitted to the DEQ project manager on an annual basis.

In addition, special reports may be prepared by BNSF personnel, due to unforeseen events or conditions. An example of a special report is an incident report, which are used to document the details of incidents involving site personnel, and other unusual events such as fires, floods, weather damage, or any extreme or unusual breach of the remedy as may be required by the O&M Plan. Another example of a special report is a record of modification or amendment to governing site documents. If special reports are prepared by BNSF personnel, they will be made available to the EPA and DEQ, in a timely manner.

Periodic monitoring will consist of at least yearly in-person inspections of the Libby Railyard and periodic contact to BNSF maintenance management and relevant property users to remind them of the presence and requirements of the ICs. The monitoring will assess for changes in land use, condition of physical remedies, property transfers, and effectiveness of applicable ICs. ICs will be evaluated and updated as needed. The routine and critical evaluation of ICs will assess:

1. Whether the selected IC instruments remain in place.



2. Whether the ICs are enforced such that they meet the stated objectives and performance goals and provide protection required by the response (EPA 2012).

In the event of a property transfer or change of use, more frequent monitoring may be necessary.

Operable Units 4, 5, 7, and 8 rely on public observers to assist in monitoring IC conditions and identifying problems. However, OU6 is private property and access is restricted to BNSF personnel and authorized property users. BNSF relies on the continuous education of employees to communicate changes to safety rules, work practices, and environmental procedures. BNSF personnel working within the OU6 will be briefed on ICs, identification of LA source materials, and reporting procedures for potential IC-related issues within OU6. In addition, the ARP will be available to the community to respond to concerns regarding OU6 and provide information and guidance.

Details regarding site inspections, which include the monitoring of ICs, are described in the OU6 O&M Plan.



# Section 7: Institutional Control Enforcement

IC enforcement consists of methods for addressing issues related to improper or incomplete implementation of ICs, maintenance of ICs, and breaches of ICs. Generally, enforcement at OU6 will be the responsibility of the DEQ. In the event that enforcement is not properly implemented, the EPA has the authority to request compliance, and if necessary, impose penalties for lack of compliance or in cases of ongoing non-compliance as described in the CD and AOC.

At the Libby Railyard, enforcement of MCA Section 75-10-727, institutional controls (Restrictive Covenant) is an administrative process that can be supported by legal action if necessary. Informational ICs are generally not an enforceable component, but if the responsible entity has failed to implement the ICs outlined, legal actions may be used to ensure the ICs are implemented as designed.

Guidance recommends that often the most effective method of enforcement is early problem identification and communication. This can include site visits and issuing letters or notices to provide documentation of the problem.

Further details regarding site inspections for the purpose of enforcing and monitoring ICs currently in place are described in the OU6 O&M Plan.



# Section 8: Institutional Control Modification and Termination

At OU6, modification of ICs may be required in the event of a change in site conditions, a change in land use, or a change in ownership. If an event occurs that could lead to a modification, this ICIAP should be reviewed and revised accordingly to ensure the ICs in OU6 continue to provide adequate protection. In addition, the EPA will accept public comment on OU-specific ICs and prepare a modification to the ROD for the Site known as an "Explanation of Significant Differences" (ESD). The OU6 ESD will reference this ICIAP and will identify the specific IC requirements and IC tools that the EPA will use to implement the ICs selected in the ROD. Termination of ICs may occur if remaining soil containing LAs and LA source materials are removed from OU6 to a concentration below which poses an unacceptable risk to health and the environment. The EPA is responsible for determining whether modifications of this document are appropriate. The EPA and DEQ (for MCA Section 75-10-727, institutional controls) are responsible for termination of the ICs related to OU6.



#### References

- Arcadis. 2020. Asbestos-Containing Material (ACM) Inspection Report 218 East 1<sup>st</sup> Street/220 East 1<sup>st</sup> Street, Libby, MT 55923 US.
- CDM Smith. 2002. Contaminant Screening Study Primary Structure and Property Assessment Information Field Form – Various buildings within OU6.
- CDM Smith. 2014. Note to File Subject: Properties within GID 7449.
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- Kennedy/Jenks Consultants, Inc. 2014. Final Remedial Investigation Report for Operable Unit 6 at the Libby Asbestos Site – Libby, Montana. Duluth, Minnesota.
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- Meeker, G.P., Bern, A.M., Brownfield, I.K., Lowers, H.A., Sutley, S.J., Hoeffen, T.M., Vance, T.S. 2003. The Composition and Morphology of Amphiboles from the Rainy Creek Complex, Near Libby Montana. American Mineralogist. 88: 1955-1969.
- Tetra Tech. 2009. Troy Asbestos Property Evaluation Field Diagram of Property Yard GID 213230 (Yaak Avenue).
- U.S. Environmental Protection Agency. 2012. Institutional Controls: A Guide to Preparing Institutional Control Implementation and Assurance Plans at Contaminated Sites, OSWER 9200.0-77, EPA-540-R-09-002. December.
- U.S. Environmental Protection Agency. 2016a. Record of Decision for Libby Asbestos Superfund Site, Libby and Troy Residential and Commercial Properties, Parks and Schools, Transportation Corridors, Industrial Park. Operable Units 4-8. Denver, Colorado. February.
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Figures



# Legend





- Limits of OU6 extend from approximately MP 1301 to MP 1342.
   Milepost, railyard, and rail siding data provided by BNSF.
   Railroad mileposts are not equally spaced at 5,280 foot intervals.
   All locations are approximate.



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# Kennedy/Jenks Consultants

BNSF Railway Company BNSF Operable Unit 6 Libby, Montana

#### **Site Location Map**

1749206.10 November 2017

Figure 1

Miles



#### Legend

- Railroad Mileposts Site OU Boudnaries ٠ Siding Extent 🕂 Railway Libby Yard Troy Yard
  - OU1: Former Export Plant OU2: Former Screening Plant
  - OU3: Former Libby Vermiculite Mine
  - OU4: Residential/Commercial Areas within Libby
- OU5: Former Stimson Lumber Mill
- OU6: BNSF Railroad
- OU7: Residential/Commercial Areas within Troy
- OU8: Highways



# Kennedy/Jenks Consultants

BNSF Railway Company BNSF Operable Unit 6 Libby, Montana

#### **Operable Unit Map**

1749206.10 November 2017

Figure 2



# Legend



2005 Approximate Response Action Area

2004 Approximate Response Action Area

OU6 Building Location

Note: Location and extent of institutional control boundary areas are approximate.

- <sup>(a)</sup>EPA conducted contaminant screening study in 2002.
- <sup>(b)</sup>Building has since been removed
- <sup>(c)</sup>Contaminant screening non conducted by EPA. BNSF completed survey in 2020.



#### Kennedy/Jenks Consultants

BNSF Railway Company BNSF Operable Unit 6 Libby, Montana

BNSF Libby Response Action and Removal Areas and OU6 Building Locations

> 1949206.10 December 2020

> > Figure 3


Note: Location and extent of depicted response action areas are approximate.

<sup>(a)</sup> DEQ conducted a Troy asbestos property evaluation in 2009.



### Kennedy/Jenks Consultants

BNSF Railway Company BNSF Operable Unit 6 Troy, Montana

**BNSF Troy Response Action** and OU6 Building Locations

> 1949206.00 December 2020



## Legend 2001 Approximate EPA-Led Response Action Areas

### Notes:

 Location and extent of depicted response action areas are approximate and are based on information provided by CDM Smith.



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BNSF Railway Company BNSF Operable Unit 6 Libby, Montana

W.R. Grace Loadout Response Action Areas

> 1749206.10 November 2017



### Soil Sample (2008-2009)

- LA Non-detect
- $\bigcirc$ Trace LA

- LA Non-detect
- 0 Trace LA

- Visible Vermiculite Soil Sample (2016)
- LA Non-detect ☆
- Trace LA ☆

ROW Surface Soil Samples (2016) Troy Tunnel Composite Soil Sample (2016) -+-+ Railway

LA Non-detect

Trace LA

Libby Amtrak Composite Soil Sample (2016)

- LA Non-detect  $\wedge$
- $\land$ Trace LA
- OU6 BNSF Right-of-Way
- Railroad Milepost Number 1342
- ND Not Dectected



### Kennedy/Jenks Consultants

BNSF Railway Company BNSF Operable Unit 6 Libby, Montana

Summary of Soil Sample Results (2001-2016)

> 1749206.10 March 2018





Zone 1/2/3 - Area Containing Tremolite/Actinolite

Zone 4/7 East Tract - Area Containing Tremolite/Actinolite

Zone 4/7 West Tract - Area Containing Tremolite/Actinolite

Note: Location and extent of institutional control boundary areas are approximate.



### Kennedy/Jenks Consultants

BNSF Railway Company BNSF Operable Unit 6 Libby, Montana

BNSF Libby Railyard - Areas with Tremolite/Actinolite in Soil

> 1749206.10 November 2017





- Railroad Mileposts
- → + Railway
- ROW Composite Soil Sample
- Libby Amphibole (LA) Non-detect
- Trace LA



## Kennedy/Jenks Consultants

BNSF Railway Company BNSF Operable Unit 6 Libby, Montana

LA Concentrations in Surface Soil -MP 1301 - 1312

> 1749206.10 November 2017





OU6 - BNSF Right-of-Way

- Troy Tunnel Composite Soil Sample
  LA Non-detect
- Railroad Mileposts
- → + Railway
- **ROW Composite Soil Sample**
- LA Non-detect
- Trace LA

- Trace LA
- Libby Amtrak Composite Soil Sample
- ▲ LA Non-detect
- △ Trace LA



### Kennedy/Jenks Consultants

BNSF Railway Company BNSF Operable Unit 6 Libby, Montana

LA Concentrations in Surface Soil -MP 1319 - 1342

> 1749206.10 November 2017

> > Figure 9

liles

14,000 Feet

# Appendix A

Restrictive Covenant for Real Property

After Recording Return to:

Doug McReynolds Director of Environmental Project Controls BNSF Railway Company 2500 Lou Menk Drive, AOB-3 Fort Worth, TX 76131

	272067 BOOK: 370 RECORDS PAGE: 508 Pages: 9
	STATE OF MONTANA LINCOLN COUNTY
	RECORDED: 12/19/2017 4:18 KOI: COVENANTS
	ROBIN A. BENSON CLERK AND REGORDER
	FEE: \$63.00 BY LUCHERM DOWN
DECLARATION OF RESTRIC	FOR: KENNEDY/JEHKS CONSULTANTS INC 303 SECOND ST SUITE 300, SAN CTIVE COVENANTS ON REAL PROPERTY

- This Declaration of Restrictive Covenants on real property ("Institutional Controls") is made this 19th day of December 2017 by BNSF Railway Company ("Owner"), pursuant to Section 75-10-727, Montana Code Annotated ("MCA"), with the approval of the United States Environmental Protection Agency ("EPA") and the Montana Department of Environmental Quality ("DEQ"), third-party beneficiaries of these Institutional Controls.
- WHEREAS, Owner is the owner of real property located in the City of Libby, County of Lincoln, State of Montana that includes approximately 3.204 acres, described and shown on Exhibit A, Sheet 1– 3 of 3 (the "Property") located in Section 3, Township 30N, Range 31W, P.M.M. of Lincoln County. The Property is currently and historically has been used for railroad purposes; and
- 3. WHEREAS, in the Action Memorandum dated August 17, 2001 and its amendments (Action Memorandum), EPA Region 8 selected a Removal Action for the Property which allows for suspected asbestos-impacted soils to be left at depth on the Property above levels that allow for unlimited use and unrestricted exposure providing these Institutional Controls are employed to mitigate the risk posed to public health, safety, and welfare, and the environment, limit land/resource use, and/or protect the integrity of the remedy. "Removal Action" shall mean the Removal Action described in the Action Memorandum and amendments thereto, and performed by the Owner pursuant to an Administrative Order on Consent for Removal Action, CERCLA Docket No. CERCLA-08-2003-0004 (AOC); and

- 4. WHEREAS, EPA has determined that the Removal Action has been completed for the Property as more particularly described in Exhibit A; and
- 5. WHEREAS, in the Record of Decision dated February 8, 2016 (the "ROD"), the Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, for EPA Region VIII, with the State of Montana's concurrence, selected a Remedial Action for OU6 which allows for waste to be left on Site above levels that allow for unlimited use and unrestricted exposure providing these Institutional Controls are employed to mitigate a risk to the public health, safety, and welfare and the environment, limit land/resource use, and/or protect the integrity of the remedy. "Remedial Action" shall mean the Remedial Action described in the Libby Superfund Site Libby and Troy Residential and Commercial Properties, Parks and Schools, Transportation Corridors, and Industrial Park Operable Units 4 through 8 ROD, and amendments thereto; and
- 6. WHEREAS, as indicated on Exhibit A, suspected remaining asbestos-impacted soils have been covered with a geotextile fabric and a minimum of 12 inches of clean imported sub-ballast material has been placed over the fabric.

NOW, THEREFORE, Owner hereby agrees and declares:

- <u>Restrictions on Use</u>: The following covenants, conditions and restrictions apply to the use of the Property, run with the land and are binding on the Owner and its successors and assigns:
  - a) <u>Restriction on Excavation within the Property</u>. Any excavation or construction within the area restricted by these Institutional Controls (as shown on Exhibit A) that may remove, breach, disturb, or impair the geotextile fabric (as shown on Exhibit A) must be authorized in writing by EPA and DEQ.
  - b) <u>Protection of the Integrity of Removal Action</u>. No action shall be taken, allowed, suffered, or omitted on the Property if such action or omission is reasonably likely to create a risk of migration of hazardous or deleterious substances or a potential hazard to public health, safety, or welfare or the environment or result in a disturbance of the structural integrity of any engineering controls designed or utilized at the Property to contain hazardous or deleterious substances or limit human or environmental exposure to hazardous or deleterious substances.
  - c) <u>Access, Cooperation and Information</u>. Owner, on behalf of itself and any transferees, hereby grants to EPA and DEQ and their authorized representatives, including contractors, access at all reasonable times to the Property for the purpose of conducting any CERCLA response action or CECRA remedial action. EPA and DEQ will exercise all reasonable

efforts to follow Owner's current health and safety plan and Owner's directions regarding railroad safety.

EPA and DEQ retain all of their access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

- 8. <u>Conveyance of Property and Retained Right of Access</u>. Any conveyance of all or a portion of the Property by Owner must clearly state that Owner shall remain an intended beneficiary of these Institutional Controls. The conveyance shall specify that the remedy of "specific performance" will be available to Owner for violations of these Institutional Controls.
- 9. In any conveyance of all or a part of the Property, Owner and its agents shall retain the right to enter the Property at reasonable intervals and at reasonable times of day in order to inspect for violations of the Institutional Controls contained herein.
- 10. Enforcement of Institutional Controls. Owner will notify DEQ and EPA of any proposed conveyance of all or a portion of its Property at least 30 days prior to any such conveyance. DEQ and EPA need not be notified of conveyances of easements that are solely overhead and do not involve any prohibited activities specified in Section 6 of these Institutional Controls, and such conveyances do not need to include these Institutional Controls. Any conveyance by Owner shall require future owners to provide notice to all potential purchasers.
- 11. Filing Notice of Institutional Controls. Owner and all future owners shall cause the requirements of these Institutional Controls to be placed in all instruments that convey an interest in the Property, except as provided in Section 9, above. Owner shall file these Institutional Controls in the land records of the Clerk and Recorder's Office, Lincoln County, Montana, within thirty (30) days of the date it is executed by the Owner. Owner must provide EPA and DEQ with a certified true copy of said instrument and its recording reference.
- 12. <u>Notice of Institutional Controls</u>. Owner on its behalf, and on behalf of its successors and assigns, agrees to include in any instrument conveying its interest in any portion of the Property, including, but not limited to, deeds, leases and mortgages, a notice which is in substantially the following form:

NOTICE: THE INTEREST CONVEYED HEREBY IS SUBJECT TO INSTITUTIONAL CONTROLS, DATED \_\_\_\_\_\_, 20\_\_\_\_, RECORDED IN THE PUBLIC LAND RECORDS ON \_\_\_\_\_\_, 20\_\_\_, IN BOOK \_\_\_\_\_, PAGE \_\_\_\_\_, IN LINCOLN COUNTY. Within sixty (60) days of the date any such instrument or conveyance is executed, Owner must provide EPA and DEQ with a certified true copy of said instrument and, if it has been recorded in the public land records, its recording reference. Any conveyance of all or a portion of the Property must include a requirement to include the language in this Section in all future conveyances.

13. Enforcement of Institutional Controls. Owner has agreed to enforce the requirements of these Institutional Controls and take prompt action to correct any violations of these Institutional Controls. Owner has also agreed to notify DEQ and EPA within 30 calendar days of receiving actual or constructive notice of any violation or potential violation of these Institutional Controls. Owner specifically agrees that the remedy of "specific performance" of these Institutional Controls shall be available to Owner in such proceedings.

Owner, as well as EPA and DEQ shall be entitled to enforce the terms of this Institutional Control by resort to specific performance or other legal process as third-party beneficiaries including, but not limited, to the authority provided by CECRA, Section 75-10-701 *et seq*, MCA, and CERCLA as amended 42 U.S.C. § 9601, *et seq*. All remedies available hereunder shall be in addition to any and all other remedies at law or in equity, including CERCLA and CECRA. Any forbearance, delay or omission to exercise rights under this instrument in the event of a breach of any term of this instrument shall not be deemed to be a waiver of such term or of any subsequent breach of the same or any other term, or of any of the rights under this instrument. Venue for enforcement of these Institutional Controls by EPA and/or DEQ shall be in the First Judicial District Court, Montana.

14. <u>Notices</u>. Any notice, demand, request, consent, approval or communication that any party desires or is required to give to the others shall be in writing and shall either be served personally or sent by first class mail, postage prepaid, addressed as follows:

Owner: BNSF Railway Company Attn: Director Environmental Controls 2500 Lou Menk Drive, AOB-3 Fort Worth, TX 76131-2828

> Environmental Remediation Manager BNSF Railway Company 800 North Last Chance Gulch, Suite 101 Helena, MT 59601

EPA: Program Director, Superfund Remedial Program U.S. Environmental Protection Agency 1595 Wynkoop St. Denver, CO 80202

DEQ: Bureau Chief, Federal Superfund Bureau Montana Department of Environmental Quality Attn: Libby Asbestos Superfund Site P.O. Box 200901 Helena, MT 59620-0901

> Legal - Remediation Division Montana Department of Environmental Quality Attn: Libby Asbestos Superfund Site P.O. Box 200901 Helena, MT 59620-0901

- 15. <u>Controlling Law</u>. The interpretation and performance of this instrument shall be governed by the laws of the United States and the laws of the State of Montana.
- 16. These Institutional Controls shall run with the land and be binding on all holders, owners, lessees, occupiers, and purchasers of the Property in perpetuity unless or until the Institutional Controls are removed in accordance with Section 75-10-727, MCA.
- 17. The rights provided to DEQ and EPA in these Institutional Controls include any successor agencies of DEQ and EPA.

BNSF hereby adopts the restriction and covenants set forth herein which shall apply to and run with property that is the subject matter hereof to the extent not preempted by applicable federal law. BNSF is a common carrier by rail and the property to which these restrictions and covenants apply are an integral part of the interstate transportation system. By adopting this restriction, BNSF does not waive preemption under the ICC Termination Act of 1995 49 U.S.C. Section 10501(b), or other applicable federal law. ICCTA preemption is codified as 49 U.S.C. Section 10501(b).

IN WITNESS WHEREOF, BASF Railway Company has caused this instrument to be executed this <u>13</u><sup>th</sup> day of <u>December</u>, 2017.

By:

Mark D. Ude, solely in his capacity as Assistant Vice President Corporate Real Estate Development of BNSF Railway Company, and not his individual capacity

STATE OF TEXAS COUNTY OF TARRANT

) SS:

Witness my hand and official seal hereto attixed the day and year written above RHONDA BURTON Notary 10 # 3474626 My Commission Expires September 21, 2020 My commission expires: 9/24/2020







#### Description:

THREE TRACTS OF LAND, SITUATED, LYING AND BEING IN THE NORTH HALF OF SECTION 3. TOWNSHIP 30 NORTH, RANGE 31 WEST, P.M.M. LINCOLN COUNTY, MONTANA, AND MORE PARTICULARLY DESCRIBED AS FOLLOWS TO WIT

### WEST TRACT

BEGINNING at the intersection of the centerline of Colorado Avenue (City of Libby) and the northerly R/W the Burlington Northern Santa Fe Railroad as shown on Certificate of Survey No. 1202 (records of Lincoln County); Thence along said R/W S64\*59'24"E 95.00 feet; Thence N25'00'36"E 16.00 feet; Thence S64\*59'24"E 455.76 feet; Thence N25'00'36"E 34.00 feet to a set iron pin; Thence S64\*59'24"E 87.79 feet to a set iron pin; Thence S64\*59'24"E 87.79 feet to a set iron pin; Thence S64\*59'24"W N88'16'12"W 151.81 feet; Thence N84\*59'24"W 1176'04 feet; Thence N25'00'36"E 10.00 feet to a set iron pin being on said northerly R/W. Thence along said R/W S64\*59'24"E 676.94 feet to the point of beginning and containing 0.474 Acres; Subject to and logether with all appurtenant easements of record.

#### EAST TRACT:

Commencing at the intersection of the centerline of Colorado Avenue (City of Libby) and the northerly R/W the Burlington Northern Santa Fe Railroad as shown on Certificate of Survey No. 1202 (records of Lincoln County): Thence along said R/W 564\*59'24"E 95.00 feet; Thence N25'00'36"E 16.00 feet; Thence 564'59'24"E 455.76 feet; Thence N25\*00'36"E 34.00 feet to a set iron pin; Thence S64\*59'24"E 129.87 feet to a set iron pin and THE TRUE POINT OF BEGINNING OF THE TRACT OF LAND HEREIN DESCRIBED: Thence continuing along said R/W 564\*59'24"E 905.06 leet; Thence leaving said R/W S76'29'48 E 88.84 feet; Thence S61'26'10"E 61.13 feet; Thence S24\*04'14 "W 20.65 feet; Thence S64\*06'20"E 198.20 leet; Thence N24"04'14"E 21.43 leet; Thence S64"08'19"E 122.50 feet; Thence S25'49'05 W 19.75 feet; Thence 561\*41'23'E 50.02 feet; Thence N25\*49'05'E 21.88 feet; Thence S64"08'19"E 66.68 feet: Thence S63"11'22"E 200.18 feet; Thence S58'16'32"E 200.99 feet; Thence S59'04'39"E 170.07 feet; Thence S53\*59'15"E 80.29 feet to a set iron. pin: Thence S25\*00'27"W 3.46 feet; Thence N64\*59'24"W 2212.12 feet; Thence N76\*55 58"E 94.05 feet to the point of beginning and containing 2,703 Acres; Subject to and together with all appurtenant easements of record

#### 6 FOOT COVER TRACT.

Commencing at the intersection of the centerline of Colorado Avenue (City of Libby) and the northerly R/W the Burlington Northern Santa Fe Railroad as shown on Certificate of Survey No. 1202 (records of Lincoln County); Thence along said R/W S64\*59'24"E 95.00 feet; Thence N25'00'36"E 18.00 feet; Thence 564'59'24"E 455 76 feet; Thence N25'00'36"E 34.00 feet to a set iron pin; Thence 564\*59'24"E 129.87 feet to a set iron pin, Thence leaving said R/W S76\*55'58"W 94.05 feet; Thence S64'59'24"E 128.78 feet to THE TRUE POINT OF BEGINNING OF THE TRACT OF LAND HEREIN DESCRIBED Thence continuing S64\*59'24"E 42.34 feet: Thence 522"39'30"W 27.34 feet: Thence N66"22'49"W 42.02 feet: Thence N22"04'33"E 28.38 feet to the point of beginning and containing 0.027 Acres; Subject to and together with all appurtenant easements of record.

SHEET 3 OF 3







- Limits of OU6 extend from approximately MP 1301 to MP 1342.
   Milepost, railyard, and rail siding data provided by BNSF.
   Railroad mileposts are not equally spaced at 5,280 foot intervals.
   All locations are approximate.



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### Kennedy/Jenks Consultants

BNSF Railway Company BNSF Operable Unit 6 Libby, Montana

### **Site Location Map**

2149206.00 March 2021

Figure 1

Miles



- Railroad Mileposts Site OU Boudnaries ٠ Siding Extent 🕂 Railway Libby Yard Troy Yard
  - OU1: Former Export Plant OU2: Former Screening Plant
  - OU3: Former Libby Vermiculite Mine
  - OU4: Residential/Commercial Areas within Libby
- OU5: Former Stimson Lumber Mill
- OU6: BNSF Railroad
- OU7: Residential/Commercial Areas within Troy
- OU8: Highways



## Kennedy/Jenks Consultants

BNSF Railway Company BNSF Operable Unit 6 Libby, Montana

### Operable Unit Map

2149206.00 March 2021





2005 Approximate Response Action Area

2004 Approximate Response Action Area

OU6 Building Location

Note: Location and extent of institutional control boundary areas are approximate.

- <sup>(a)</sup>EPA conducted contaminant screening study in 2002.
- <sup>(b)</sup>Building has since been removed
- <sup>(c)</sup>Contaminant screening non conducted by EPA. BNSF completed survey in 2020.



### Kennedy/Jenks Consultants

BNSF Railway Company BNSF Operable Unit 6 Libby, Montana

BNSF Libby Response Action, Removal Areas, and OU6 Building Locations

> 2149206.00 March 2021



Note: Location and extent of depicted response action areas are approximate.

<sup>(a)</sup> DEQ conducted a Troy asbestos property evaluation in 2009.



### Kennedy/Jenks Consultants

BNSF Railway Company BNSF Operable Unit 6 Troy, Montana

BNSF Troy Response Action and OU6 Building Locations

> 2149206.00 March 2021



## Legend 2001 Approximate EPA-Led Response Action Areas

### Notes:

 Location and extent of depicted response action areas are approximate and are based on information provided by CDM Smith.



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### Kennedy/Jenks Consultants

BNSF Railway Company BNSF Operable Unit 6 Libby, Montana

W.R. Grace Loadout Response Action Areas

> 2149206.00 March 2021



### Soil Sample (2008-2009)

- LA Non-detect
- $\bigcirc$ Trace LA

- LA Non-detect
- 0 Trace LA

- Visible Vermiculite Soil Sample (2016)
- LA Non-detect ☆
- Trace LA ☆

ROW Surface Soil Samples (2016) Troy Tunnel Composite Soil Sample (2016) -+-+ Railway

LA Non-detect

Trace LA

Libby Amtrak Composite Soil Sample (2016)

- LA Non-detect  $\wedge$
- $\land$ Trace LA
- OU6 BNSF Right-of-Way
- Railroad Milepost Number 1342
- ND Not Dectected



### Kennedy/Jenks Consultants

BNSF Railway Company BNSF Operable Unit 6 Libby, Montana

Summary of Soil Sample Results (2001-2016)

> 2149206.00 March 2021





Zone 1/2/3 - Area Containing Tremolite/Actinolite

Zone 4/7 East Tract - Area Containing Tremolite/Actinolite

Zone 4/7 West Tract - Area Containing Tremolite/Actinolite

Note: Location and extent of institutional control boundary areas are approximate.



### Kennedy/Jenks Consultants

BNSF Railway Company BNSF Operable Unit 6 Libby, Montana

BNSF Libby Railyard - Areas with Tremolite/Actinolite in Soil

> 2149206.00 March 2021





- Railroad Mileposts
- → + Railway
- ROW Composite Soil Sample
- Libby Amphibole (LA) Non-detect
- Trace LA



### Kennedy/Jenks Consultants

BNSF Railway Company BNSF Operable Unit 6 Libby, Montana

LA Concentrations in Surface Soil -MP 1301 - 1312

> 2149206.00 March 2021





OU6 - BNSF Right-of-Way

- Troy Tunnel Composite Soil Sample
  LA Non-detect
- Railroad Mileposts
- +++ Railway
- **ROW Composite Soil Sample**
- LA Non-detect
- Trace LA

- Trace LA
- Libby Amtrak Composite Soil Sample
- ▲ LA Non-detect
- △ Trace LA



### Kennedy/Jenks Consultants

BNSF Railway Company BNSF Operable Unit 6 Libby, Montana

LA Concentrations in Surface Soil -MP 1319 - 1342

> 2149206.00 March 2021

> > Figure 9

/liles

14,000 Feet

# Appendix A

Restrictive Covenant for Real Property

After Recording Return to:

Doug McReynolds Director of Environmental Project Controls BNSF Railway Company 2500 Lou Menk Drive, AOB-3 Fort Worth, TX 76131

	272067 BOOK: 370 RECORDS PAGE: 508 Pages: 9
	STATE OF MONTANA LINCOLN COUNTY
	RECORDED: 12/19/2017 4:18 KOI: COVENANTS
	ROBIN A. BENSON CLERK AND REGORDER
	FEE: \$63.00 BY LUCHERM DOWN
DECLARATION OF RESTRIC	FOR: KENNEDY/JEHKS CONSULTANTS INC 303 SECOND ST SUITE 300, SAN CTIVE COVENANTS ON REAL PROPERTY

- This Declaration of Restrictive Covenants on real property ("Institutional Controls") is made this 19th day of December 2017 by BNSF Railway Company ("Owner"), pursuant to Section 75-10-727, Montana Code Annotated ("MCA"), with the approval of the United States Environmental Protection Agency ("EPA") and the Montana Department of Environmental Quality ("DEQ"), third-party beneficiaries of these Institutional Controls.
- WHEREAS, Owner is the owner of real property located in the City of Libby, County of Lincoln, State of Montana that includes approximately 3.204 acres, described and shown on Exhibit A, Sheet 1– 3 of 3 (the "Property") located in Section 3, Township 30N, Range 31W, P.M.M. of Lincoln County. The Property is currently and historically has been used for railroad purposes; and
- 3. WHEREAS, in the Action Memorandum dated August 17, 2001 and its amendments (Action Memorandum), EPA Region 8 selected a Removal Action for the Property which allows for suspected asbestos-impacted soils to be left at depth on the Property above levels that allow for unlimited use and unrestricted exposure providing these Institutional Controls are employed to mitigate the risk posed to public health, safety, and welfare, and the environment, limit land/resource use, and/or protect the integrity of the remedy. "Removal Action" shall mean the Removal Action described in the Action Memorandum and amendments thereto, and performed by the Owner pursuant to an Administrative Order on Consent for Removal Action, CERCLA Docket No. CERCLA-08-2003-0004 (AOC); and

- 4. WHEREAS, EPA has determined that the Removal Action has been completed for the Property as more particularly described in Exhibit A; and
- 5. WHEREAS, in the Record of Decision dated February 8, 2016 (the "ROD"), the Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, for EPA Region VIII, with the State of Montana's concurrence, selected a Remedial Action for OU6 which allows for waste to be left on Site above levels that allow for unlimited use and unrestricted exposure providing these Institutional Controls are employed to mitigate a risk to the public health, safety, and welfare and the environment, limit land/resource use, and/or protect the integrity of the remedy. "Remedial Action" shall mean the Remedial Action described in the Libby Superfund Site Libby and Troy Residential and Commercial Properties, Parks and Schools, Transportation Corridors, and Industrial Park Operable Units 4 through 8 ROD, and amendments thereto; and
- 6. WHEREAS, as indicated on Exhibit A, suspected remaining asbestos-impacted soils have been covered with a geotextile fabric and a minimum of 12 inches of clean imported sub-ballast material has been placed over the fabric.

NOW, THEREFORE, Owner hereby agrees and declares:

- <u>Restrictions on Use</u>: The following covenants, conditions and restrictions apply to the use of the Property, run with the land and are binding on the Owner and its successors and assigns:
  - a) <u>Restriction on Excavation within the Property</u>. Any excavation or construction within the area restricted by these Institutional Controls (as shown on Exhibit A) that may remove, breach, disturb, or impair the geotextile fabric (as shown on Exhibit A) must be authorized in writing by EPA and DEQ.
  - b) <u>Protection of the Integrity of Removal Action</u>. No action shall be taken, allowed, suffered, or omitted on the Property if such action or omission is reasonably likely to create a risk of migration of hazardous or deleterious substances or a potential hazard to public health, safety, or welfare or the environment or result in a disturbance of the structural integrity of any engineering controls designed or utilized at the Property to contain hazardous or deleterious substances or limit human or environmental exposure to hazardous or deleterious substances.
  - c) <u>Access, Cooperation and Information</u>. Owner, on behalf of itself and any transferees, hereby grants to EPA and DEQ and their authorized representatives, including contractors, access at all reasonable times to the Property for the purpose of conducting any CERCLA response action or CECRA remedial action. EPA and DEQ will exercise all reasonable

efforts to follow Owner's current health and safety plan and Owner's directions regarding railroad safety.

EPA and DEQ retain all of their access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

- 8. <u>Conveyance of Property and Retained Right of Access</u>. Any conveyance of all or a portion of the Property by Owner must clearly state that Owner shall remain an intended beneficiary of these Institutional Controls. The conveyance shall specify that the remedy of "specific performance" will be available to Owner for violations of these Institutional Controls.
- 9. In any conveyance of all or a part of the Property, Owner and its agents shall retain the right to enter the Property at reasonable intervals and at reasonable times of day in order to inspect for violations of the Institutional Controls contained herein.
- 10. Enforcement of Institutional Controls. Owner will notify DEQ and EPA of any proposed conveyance of all or a portion of its Property at least 30 days prior to any such conveyance. DEQ and EPA need not be notified of conveyances of easements that are solely overhead and do not involve any prohibited activities specified in Section 6 of these Institutional Controls, and such conveyances do not need to include these Institutional Controls. Any conveyance by Owner shall require future owners to provide notice to all potential purchasers.
- 11. Filing Notice of Institutional Controls. Owner and all future owners shall cause the requirements of these Institutional Controls to be placed in all instruments that convey an interest in the Property, except as provided in Section 9, above. Owner shall file these Institutional Controls in the land records of the Clerk and Recorder's Office, Lincoln County, Montana, within thirty (30) days of the date it is executed by the Owner. Owner must provide EPA and DEQ with a certified true copy of said instrument and its recording reference.
- 12. <u>Notice of Institutional Controls</u>. Owner on its behalf, and on behalf of its successors and assigns, agrees to include in any instrument conveying its interest in any portion of the Property, including, but not limited to, deeds, leases and mortgages, a notice which is in substantially the following form:

NOTICE: THE INTEREST CONVEYED HEREBY IS SUBJECT TO INSTITUTIONAL CONTROLS, DATED \_\_\_\_\_\_, 20\_\_\_\_, RECORDED IN THE PUBLIC LAND RECORDS ON \_\_\_\_\_\_, 20\_\_\_, IN BOOK \_\_\_\_\_, PAGE \_\_\_\_\_, IN LINCOLN COUNTY. Within sixty (60) days of the date any such instrument or conveyance is executed, Owner must provide EPA and DEQ with a certified true copy of said instrument and, if it has been recorded in the public land records, its recording reference. Any conveyance of all or a portion of the Property must include a requirement to include the language in this Section in all future conveyances.

13. Enforcement of Institutional Controls. Owner has agreed to enforce the requirements of these Institutional Controls and take prompt action to correct any violations of these Institutional Controls. Owner has also agreed to notify DEQ and EPA within 30 calendar days of receiving actual or constructive notice of any violation or potential violation of these Institutional Controls. Owner specifically agrees that the remedy of "specific performance" of these Institutional Controls shall be available to Owner in such proceedings.

Owner, as well as EPA and DEQ shall be entitled to enforce the terms of this Institutional Control by resort to specific performance or other legal process as third-party beneficiaries including, but not limited, to the authority provided by CECRA, Section 75-10-701 *et seq*, MCA, and CERCLA as amended 42 U.S.C. § 9601, *et seq*. All remedies available hereunder shall be in addition to any and all other remedies at law or in equity, including CERCLA and CECRA. Any forbearance, delay or omission to exercise rights under this instrument in the event of a breach of any term of this instrument shall not be deemed to be a waiver of such term or of any subsequent breach of the same or any other term, or of any of the rights under this instrument. Venue for enforcement of these Institutional Controls by EPA and/or DEQ shall be in the First Judicial District Court, Montana.

14. <u>Notices</u>. Any notice, demand, request, consent, approval or communication that any party desires or is required to give to the others shall be in writing and shall either be served personally or sent by first class mail, postage prepaid, addressed as follows:

Owner: BNSF Railway Company Attn: Director Environmental Controls 2500 Lou Menk Drive, AOB-3 Fort Worth, TX 76131-2828

> Environmental Remediation Manager BNSF Railway Company 800 North Last Chance Gulch, Suite 101 Helena, MT 59601

EPA: Program Director, Superfund Remedial Program U.S. Environmental Protection Agency 1595 Wynkoop St. Denver, CO 80202

DEQ: Bureau Chief, Federal Superfund Bureau Montana Department of Environmental Quality Attn: Libby Asbestos Superfund Site P.O. Box 200901 Helena, MT 59620-0901

> Legal - Remediation Division Montana Department of Environmental Quality Attn: Libby Asbestos Superfund Site P.O. Box 200901 Helena, MT 59620-0901

- 15. <u>Controlling Law</u>. The interpretation and performance of this instrument shall be governed by the laws of the United States and the laws of the State of Montana.
- 16. These Institutional Controls shall run with the land and be binding on all holders, owners, lessees, occupiers, and purchasers of the Property in perpetuity unless or until the Institutional Controls are removed in accordance with Section 75-10-727, MCA.
- 17. The rights provided to DEQ and EPA in these Institutional Controls include any successor agencies of DEQ and EPA.

BNSF hereby adopts the restriction and covenants set forth herein which shall apply to and run with property that is the subject matter hereof to the extent not preempted by applicable federal law. BNSF is a common carrier by rail and the property to which these restrictions and covenants apply are an integral part of the interstate transportation system. By adopting this restriction, BNSF does not waive preemption under the ICC Termination Act of 1995 49 U.S.C. Section 10501(b), or other applicable federal law. ICCTA preemption is codified as 49 U.S.C. Section 10501(b).

IN WITNESS WHEREOF, BASF Railway Company has caused this instrument to be executed this <u>13</u><sup>th</sup> day of <u>December</u>, 2017.

By:

Mark D. Ude, solely in his capacity as Assistant Vice President Corporate Real Estate Development of BNSF Railway Company, and not his individual capacity

STATE OF TEXAS COUNTY OF TARRANT

) SS:

Witness my hand and official seal hereto attixed the day and year written above RHONDA BURTON Notary 10 # 3474626 My Commission Expires September 21, 2020 My commission expires: 9/24/2020







#### Description:

THREE TRACTS OF LAND, SITUATED, LYING AND BEING IN THE NORTH HALF OF SECTION 3. TOWNSHIP 30 NORTH, RANGE 31 WEST, P.M.M. LINCOLN COUNTY, MONTANA, AND MORE PARTICULARLY DESCRIBED AS FOLLOWS TO WIT

### WEST TRACT

BEGINNING at the intersection of the centerline of Colorado Avenue (City of Libby) and the northerly R/W the Burlington Northern Santa Fe Railroad as shown on Certificate of Survey No. 1202 (records of Lincoln County); Thence along said R/W S64\*59'24"E 95.00 feet; Thence N25'00'36"E 16.00 feet; Thence S64\*59'24"E 455.76 feet; Thence N25'00'36"E 34.00 feet to a set iron pin; Thence S64\*59'24"E 87.79 feet to a set iron pin; Thence S64\*59'24"E 87.79 feet to a set iron pin; Thence S64\*59'24"W N88'16'12"W 151.81 feet; Thence N84\*59'24"W 1176'04 feet; Thence N25'00'36"E 10.00 feet to a set iron pin being on said northerly R/W. Thence along said R/W S64\*59'24"E 676.94 feet to the point of beginning and containing 0.474 Acres; Subject to and logether with all appurtenant easements of record.

#### EAST TRACT:

Commencing at the intersection of the centerline of Colorado Avenue (City of Libby) and the northerly R/W the Burlington Northern Santa Fe Railroad as shown on Certificate of Survey No. 1202 (records of Lincoln County): Thence along said R/W 564\*59'24"E 95.00 feet; Thence N25'00'36"E 16.00 feet; Thence 564'59'24"E 455.76 feet; Thence N25\*00'36"E 34.00 feet to a set iron pin; Thence S64\*59'24"E 129.87 feet to a set iron pin and THE TRUE POINT OF BEGINNING OF THE TRACT OF LAND HEREIN DESCRIBED: Thence continuing along said R/W 564\*59'24"E 905.06 leet; Thence leaving said R/W S76'29'48 E 88.84 feet; Thence S61'26'10"E 61.13 feet; Thence S24\*04'14 "W 20.65 feet; Thence S64\*06'20"E 198.20 leet; Thence N24"04'14"E 21.43 leet; Thence S64"08'19"E 122.50 feet; Thence S25'49'05 W 19.75 feet; Thence 561\*41'23'E 50.02 feet; Thence N25\*49'05'E 21.88 feet; Thence S64"08'19"E 66.68 feet: Thence S63"11'22"E 200.18 feet; Thence S58'16'32"E 200.99 feet; Thence S59'04'39"E 170.07 feet; Thence S53\*59'15"E 80.29 feet to a set iron. pin: Thence S25\*00'27"W 3.46 feet; Thence N64\*59'24"W 2212.12 feet; Thence N76\*55 58"E 94.05 feet to the point of beginning and containing 2,703 Acres; Subject to and together with all appurtenant easements of record

#### 6 FOOT COVER TRACT.

Commencing at the intersection of the centerline of Colorado Avenue (City of Libby) and the northerly R/W the Burlington Northern Santa Fe Railroad as shown on Certificate of Survey No. 1202 (records of Lincoln County); Thence along said R/W S64\*59'24"E 95.00 feet; Thence N25'00'36"E 18.00 feet; Thence 564'59'24"E 455 76 feet; Thence N25'00'36"E 34.00 feet to a set iron pin; Thence 564\*59'24"E 129.87 feet to a set iron pin, Thence leaving said R/W S76\*55'58"W 94.05 feet; Thence S64'59'24"E 128.78 feet to THE TRUE POINT OF BEGINNING OF THE TRACT OF LAND HEREIN DESCRIBED Thence continuing S64\*59'24"E 42.34 feet: Thence 522"39'30"W 27.34 feet: Thence N66"22'49"W 42.02 feet: Thence N22"04'33"E 28.38 feet to the point of beginning and containing 0.027 Acres; Subject to and together with all appurtenant easements of record.

SHEET 3 OF 3